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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MICHAEL KATZ-LACABE, ET AL.,

Plaintiffs,

v.

ORACLE AMERICA, INC., a corporation organized under the laws of the State of Delaware,

Defendant.

Case No. 3-22-cv-04792-RS

DEFENDANT ORACLE AMERICA INC.'S RESPONSE TO PLAINTIFFS' SUR-REPLY TO DEFENDANT'S MOTION TO DISMISS PORTIONS OF PLAINTIFFS' SECOND AMENDED COMPLAINT

Judge: Hon. Richard Seeborg

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I. INTRODUCTION

Stripped of all the rhetoric, Plaintiffs' sur-reply amounts to little more than a repeat of what they have already pled in the Second Amended Complaint and already argued in their opposition to Oracle's pending motion to dismiss. Plaintiffs put before the Court six data spreadsheets Oracle produced after filing its reply (the "Discovery Material"), claiming that these materials "show" that Oracle acted with a "tortious purpose" sufficient to trigger ECPA's crime-tort exception. Even if their portrayal of the data was accurate—and it is not—this purportedly "new" "evidence" ***is irrelevant to Oracle's Rule 12(b)(6) motion***. It should not and cannot be considered.

Seeking to avoid this result, Plaintiffs characterize their sur-reply as an anticipatory request for leave to amend the Second Amended Complaint "to address any shortcomings in the pleadings." Plaintiffs' request for leave to amend should be denied as futile. Even if accepted as true, Plaintiffs' mischaracterizations of the Discovery Material add nothing new to the ECPA claim that they have tried to advance (unsuccessfully) since the start of this lawsuit. Nor is there any merit to Plaintiffs' claim that Oracle "concealed" the Discovery Material or otherwise delayed its production. Rather, as Plaintiffs are well aware, Oracle was forced to expend considerable resources to create the Discovery Material at Plaintiffs' behest for purposes of the litigation. It did so because Oracle ***does not generate or use such records in the ordinary course of business***.

Finally, Plaintiffs' sur-reply makes plain that they fundamentally misunderstand the documents they cite. Had Plaintiffs investigated Oracle's policies and practices in relation to "sensitive personal information," they would be well aware that the Discovery Material does ***not*** suggest that Oracle sells advertising segments based on such data. For all these reasons, the Court should dismiss Plaintiffs' ECPA claim without leave to amend.

II. ARGUMENT

A. The Discovery Material Is Irrelevant to the Pending Motion to Dismiss

Plaintiffs contend that the Discovery Material shows that Oracle creates advertising segments based on "highly sensitive" data, contrary to its privacy policy and to its representations

before this Court. (ECF No. 98-3 ("Sur-Reply") at 2-3.) Even accepting this inaccurate characterization as true, it is ***entirely irrelevant*** to Oracle's motion to dismiss because Plaintiffs already ***alleged*** that Oracle does what they claim the Discovery Material purportedly ***shows***, and the Court accepts those allegations as true in ruling on Oracle's motion to dismiss. *See Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029-30 (9th Cir. 2009) (courts must "accept all factual allegations in the complaint as true" when evaluating a motion to dismiss); (*see also* SAC ¶ 130 ("despite Oracle's representations to the public, Oracle has continued to offer 'sensitive interest segments' for sale"); *see also* Opp. at 14 (discussing same allegations).) As the Ninth Circuit has held, when "determining the propriety of a Rule 12(b)(6) dismissal, a court ***may not*** look beyond the complaint . . . such as a memorandum in opposition to a defendant's motion to dismiss," or, in this case, Plaintiffs' sur-reply. *Schneider v. Cal. Dept. of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (emphasis in original). As such, Plaintiffs' attempt to put forward supposed "new evidence" to "address any shortcomings in the pleadings" should be flatly rejected. *Cf. In Re Cloudera, Inc.*, No. 19-CV-03221-LHK, 2021 WL 2115303, at *8 n.2 (N.D. Cal. May 25, 2021) (denying motion for leave to file a sur-reply where proposed sur-reply would offer new evidence in support of motion to dismiss); *see also ex rel. Garrett v. Elk Grove Unified Sch. Dist.*, No. 2:17-cv-00729-TLN-KJN, 2018 WL 1726646, at *2 (E.D. Cal. Apr. 10, 2018) (it is "axiomatic" that factual averments in a "complaint may not be amended by the briefs"); (Sur-Reply at 1). Because the Court "may not look beyond [the SAC,]" Plaintiffs' request to preemptively "address any shortcomings in the pleadings" through their sur-reply should be denied. *Schneider*, 151 F.3d at 1197 n.1; (Sur-Reply at 1.)

B. A Third Amended Complaint Again Repleading an ECPA Claim Would Be Futile

Recognizing the impropriety of their offered "evidence" in opposition to Oracle's motion to dismiss, Plaintiffs present their sur-reply as an anticipatory request for leave to try to plead their ECPA claim a fourth time through a ***Third*** Amended Complaint. The request for leave to amend should be denied. Plaintiffs offer two supposed bases for their request for leave: (1) the Discovery Material supposedly "shows" that Oracle "did in fact" create "sensitive" profiles,

contrary to Oracle's representations (Sur-Reply at 9); and (2) the timing of Oracle's production somehow amounts to "concealment" and thereby reflects Oracle's "tortious purpose." (Sur-Reply at 7-10.) But neither allegation in any way advances Plaintiffs' assertion that Oracle operates its business with an "'insidious' intent to harm [P]laintiffs or others." *In re DoubleClick Inc. Priv. Litig.*, 154 F. Supp. 2d 497, 518 (S.D.N.Y. 2001). Because Plaintiffs' proposed amendments would not cure the deficiencies of the prior complaints and the parties would be in the exact same place as they are today, the ***Third*** Amended Complaint "would immediately be 'subject to dismissal.'" *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 328 F. Supp. 3d 963, 983 (N.D. Cal. 2018) (quoting *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998)). Plaintiffs' request for leave to amend should therefore be denied as futile. *See Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004) ("[f]utility alone" is sufficient grounds to deny leave to amend).

1. Plaintiffs' allegations based on the Discovery Material are identical to those the Court previously found insufficient to apply ECPA's crime-tort exception and to the allegations in the SAC

The sur-reply makes clear that Plaintiffs' "new" allegations based on the Discovery Material are not actually new. Even if Plaintiffs' allegations as to the contents of the Discovery Material were accurate, they are ***substantively identical*** to the allegations that the Court has thus far found insufficient to apply ECPA's crime-tort exception and to the defective allegations at the center of the SAC. Plaintiffs have alleged, ***since the start of this lawsuit***, that:

- "Oracle's Health and Wellness segments reveal sensitive, health-related types of personal information Oracle collects on Class members[,] . . . [with] segments includ[ing] individuals struggling with insomnia . . . acne ("Acne Treatments"), weight issues[,] [etc.]" (Complaint ¶ 61, First Amended Complaint ("FAC") ¶ 76);
- Oracle "boasts a dataset that includes 'extensive political identification, coalition and membership information'" (Complaint ¶ 65(c), FAC ¶ 80(c));
- Oracle offers "segments such as . . . 'Pro Marriage Same Sex,' 'Pro Traditional Marriage,' 'Democratic Voters,' [and] 'Independent Voters, [among others]" (Complaint ¶ 65(c), FAC ¶ 80(c)); and that
- ***Contrary to Oracle's privacy policy,*** "data brokers on the Data Marketplace sell data on individuals' politics." (Complaint ¶ 98, FAC ¶ 113.)

The Court has already considered these allegations. Indeed, the Court's prior ruling on Plaintiffs' California intrusion upon seclusion claims that Plaintiffs refer to in the sur-reply ***explicitly cites to***

these exact allegations in the Complaint. (*See* Sur-Reply at 7 (citing ECF No. 49 at 12); ECF No. 49 at 12 (citing Complaint at 14-15, 27, 31-32, 44).) But, critically, the Court dismissed Plaintiffs' ECPA claim in the same Order, concluding that "[Oracle's] 'purpose has plainly not been to perpetuate torts on millions of Internet users, but to make money.'" (ECF No. 49 at 16 (quoting *Rodriguez v. Google LLC*, No. 20-CV-04688-RS, 2021 WL 2026726, at *6 (N.D. Cal. May 21, 2021)); *see also* ECF No. 77 at 11 n.11 (similar).) Plaintiffs' "Discovery Material" allegations, substantially identical to those the Court has already considered, do not warrant any departure from the Court's prior ruling.

Plaintiffs' Discovery Material-based assertions are also coextensive with their allegations in the SAC. Seeking to replead their ECPA claim, Plaintiffs added allegations in the SAC for the proposition that, "despite Oracle's representations to the public, Oracle has continued to offer 'sensitive interest segments' for sale." (SAC ¶ 130 (citing a "nonprofit news publication").) Now, Plaintiffs attempt to put before the Court supposedly "new" "evidence" that they say "shows" that these same allegations are true. (*See* Sur-Reply at 9 ("this data definitively resolves 'whether Oracle plausibly did collect and aggregate information to reveal' sensitive information") (quoting ECF No. 49 at 12).) Though Plaintiffs' allegations ***are untrue***, the truth of the allegations is of course beside the point. (*See* ECF No. 49 at 5 ("[w]hen evaluating [a Rule 12(b)(6)] motion, the court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party").) The point is, even if true, "such allegations would still fail to plausibly allege that Oracle intended to harm web users." (ECF No. 88 ("Mot.") at 9; ECF No. 92 ("Reply") at 12.) That's because, as discussed in Oracle's opening brief, "Oracle's alleged conduct in creating and selling the [] purportedly sensitive segments is lawful and [(as Plaintiffs themselves claim)] motivated by the company's profit incentive." (Mot. at 10; *see also* SAC ¶¶ 42, 268, 275 (discussing Oracle's "plan to profit from" putative class members' data); Mot. at 8-11; Reply at 12-13.) Additional documents purportedly showing Oracle's "inferences" about Plaintiffs' politics, health, gender, race, and sexual reproductive decisions will not change that analysis. As such, Plaintiffs' proposed amendments concerning the Discovery Material's contents would not cure the deficiencies of the

prior complaint and would "immediately be 'subject to dismissal.'" *In re Volkswagen*, 328 F. Supp. 3d at 983 (citation omitted). As a result, Plaintiffs' anticipatory request for leave to amend should be rejected as futile. *See id.* at 983 (amendment futile where "there is no reason to believe that 'the deficiencies can be cured with additional allegations'") (citing *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011)).

2. The timing of Oracle's production does not plausibly suggest any tortious intent

Looking beyond the four corners of the SAC (and the produced documents), Plaintiffs suggest that the timing of Oracle's production somehow further supports their position that Oracle conducts its business with a "culpable mind." (*See* Sur-Reply at 9.) Not so. Oracle has diligently responded to Plaintiffs' overly burdensome discovery requests over the last fifteen months. Even so, Plaintiffs refer to a February 28, 2023 letter from Oracle's counsel to imply that Oracle has previously taken the position that it did not have in its possession the Discovery Material Plaintiffs now put before the Court. (*See* Sur-Reply at 8 (claiming Oracle represented that "it had no data in its possession related to Plaintiffs beyond what was contained in [Plaintiffs'] OARRRs [attached to the complaint]"). The portion of the letter Plaintiffs raise in the sur-reply concerns their request for all "personal data about the Plaintiffs in this action" (Plaintiffs' RFP No. 2).

Contrary to Plaintiffs' characterization, Oracle never suggested that the Discovery Material ***did not exist***. Instead, as Oracle represented in the very letter Plaintiffs cite, Oracle "can only tie the advertising segments associated with an individual's identifiers at the time an individual makes a[n] [OARRR]." (Declaration of Christin J. Hill ("Hill Decl.") Ex. A at 4 (February 28, 2023 Letter from W. O'Byrne to Plaintiffs' Counsel).) Oracle generates reports of segments associated with an individual's offline identifiers—or "OARRRs"—following a request from a consumer, as is required under the California Privacy Rights Act (previously, California Consumer Privacy Act). Plaintiffs allege as much. (*See* SAC ¶¶ 4, 20.) As Oracle has repeatedly represented to Plaintiffs, Oracle ***does not employ a process in the ordinary course of business*** to gather all information over time that may be associated with a given individual's identifiers outside of this specialized OARRR process. (*See, e.g.,* Hill Decl. Ex. A at 2 ("Oracle can only

create a[n] [OARRR] tying an individual's identifiers to advertising segments upon individual request and after tha[t] individual has verified their identity.").) Following the parties' meet and confers on the request, the parties turned their attention to other discovery matters and briefing on Oracle's motion to dismiss the First Amended Complaint. Plaintiffs did not return to this issue until November 2023—nine months after Oracle's February 2023 letter—and did so only after meeting and conferring on an entirely different set of document requests (*i.e.*, Plaintiffs' second set). (Hill Decl. ¶¶ 9-11.)

Oracle worked in good faith to generate the Discovery Material in response to Plaintiffs' second set of document requests notwithstanding technical challenges. Plaintiffs served their second set of requests on September 12, 2023—months after the parties last communicated regarding Plaintiffs' request for "personal data" (RFP No. 2). Plaintiffs' second set included a request for "data in native format . . . Oracle used or relied on to produce the OARRRs" (RFP No. 28), which Oracle interpreted as distinct from RFP No. 2. Indeed, the parties met and conferred on Plaintiffs' second set of document requests on November 9, 2023 and at no point discussed RFP No. 2. (Hill Decl. ¶ 9; *see also id.* Ex. C at 4 (November 22, 2023 Letter from C. Hill to Plaintiffs' Counsel).) Rather, after months of inactivity, Plaintiffs re-raised RFP No. 2 in a letter sent on November 14, 2023—five days after the parties' meet and confer. (*Id.* Ex. B at 4.) Once Oracle received the letter, it continued to meet and confer with Plaintiffs on both RFP Nos. 2 and 28 into the new year, while Oracle simultaneously investigated the feasibility of Plaintiffs' request that Oracle ***prepare*** the information not available in the ordinary course of business. (*Id.* ¶¶ 12-13.)

Oracle explored Plaintiffs' requests and ultimately produced the Discovery Material showing audience segments and other available information associated with Plaintiffs' online identifiers. Simply put, Oracle did not "conceal" anything in its responses to Plaintiffs' discovery requests. Rather, Oracle's production is in keeping with the manner in which litigation progresses as the parties met and conferred on discovery and, at times, turned their attention to other activities in this case, like briefing. As such, Plaintiffs' allegations of delay and of Oracle's

purported "tortious intent" are unfounded, and their preemptive request for leave to amend the complaint should be denied.[1]

C. Plaintiffs Fundamentally Misunderstand the Discovery Material they Put Before the Court

Plaintiffs' characterizations of the Discovery Material—and their associated claim that Oracle "misrepresented" its privacy practices to the Court—are irrelevant to Oracle's motion to dismiss and to Plaintiffs' request for leave to amend. Even so, in light of Plaintiffs' heated rhetoric, it bears emphasizing that Plaintiffs lack even a basic understanding as to how Oracle handles "highly sensitive" data pursuant to its privacy policy. As a result, Plaintiffs fundamentally misunderstand the contents of the Discovery Material, and their accusation that Oracle "misrepresented its sale of these interest segments to the Court" is baseless. (Sur-Reply at 2.)

First, Plaintiffs' argument is premised on a gross mischaracterization of the Discovery Material, evidencing a vital gap in their knowledge of how Oracle handles "highly sensitive" data. This gap in knowledge is a direct result of Plaintiffs' failure to engage in even the most basic discovery. Indeed, Plaintiffs waited until November 2023 to seek discovery regarding Oracle's alleged "collection, purchase, sale or use of 'sensitive personal information'" and Plaintiffs have yet to agree to search terms for that discovery, which have been pending with Plaintiffs for more than two weeks now.[2]

More critically, in more than fifteen months of discovery, Plaintiffs have yet to take the deposition of a corporate witness regarding alleged "sensitive" advertising segments or on any other matter. In fact, Plaintiffs have taken only one deposition of a relatively low-level Oracle

[1] Plaintiffs' cited cases are inapposite as neither deal with alleged discovery delays, and therefore cannot support Plaintiffs' bold assertion that the alleged "delays" reflect a tortious purpose under the ECPA's crime-tort exception. *See United States v. Galecki*, 89 F.4th 713, 728 (9th Cir. 2023) (finding requisite scienter to support conviction under Controlled Substances Act given defendants' false labeling of a cannabinoid as "potpourri" and "incense"); *In re Nature's Sunshine Prod. Sec. Litig.*, 486 F. Supp. 2d 1301, 1311 (D. Utah 2007) (allegation that defendants misrepresented fraudulent activities to auditors satisfied scienter requirement for Rule 10b–5(b) claim).

[2] Plaintiffs have yet to respond as to Oracle's proposed terms for ***any*** of Plaintiffs' RFP Set Two and Three requests to be included in Oracle's document review during this time. (Hill Decl. at ¶ 14.)

employee (in his individual capacity), seemingly picked at random, with little knowledge of the products at issue in the litigation and no knowledge at all regarding Oracle's processes for updating or enforcing its privacy policy. (Hill Decl. at ¶ 5.) In meet and confer, Oracle has repeatedly implored Plaintiffs to take a Rule 30(b)(6) deposition to address their obvious information gaps, but Plaintiffs have refused.[3] (*Id.*) Having failed to reasonably investigate the matters they now put before the Court, Plaintiffs cannot substantiate their claims as to what the Discovery Material "shows."

Second, had Plaintiffs investigated these issues, they would have learned that their claims as to what the Discovery Material "shows" are entirely wrong. As an initial matter, the documents ***do not support*** Plaintiffs' claim—repeated since the early days of this litigation—that Oracle maintains "profiles" on individuals. (Sur-Reply at 4.) Rather, the Discovery Material—some six spreadsheets of data ***generated solely for purposes of litigation***—reflects offline and third-party data sets that are associated with identifiers that Oracle believes ***may*** be (but cannot be sure is) associated with Plaintiffs. More fundamentally, the Discovery Material ***does not show*** that "Oracle continues to buy, sell, and/or create sensitive information and inferences about Plaintiffs." (*Contra* Sur-Reply at 3.) To the contrary, had Plaintiffs investigated the matters raised in the sur-reply, they would have learned that:

- ***Nearly half*** of the segments Plaintiffs identify in the sur-reply have previously been identified by Oracle's compliance team during routine audits, have been deprecated, ***and have not since been sold to any Oracle customer***;
- ***More than half*** of the segments Plaintiffs identify on the topic of health specifically concern the purchase of over-the-counter treatments and do not, therefore, reflect "precise health, biometric, or genetic information" under Oracle's privacy policy;
- The political segments Plaintiffs identify—such as a segment for individuals likely to "[redacted]"[4]—merely reflects civic engagement generally and are not considered by Oracle's compliance team to reflect "political orientation" under the privacy policy; and

[3] Because Plaintiffs have failed to take such basic discovery or to seriously advance their case in the fifteen months it has been pending, Oracle is concerned about Plaintiffs' attempt to move the class certification deadlines (again). The parties continue to meet and confer about the case schedule, however. (*See* Sur-Reply at 9 n.18.)

[4] Oracle files the foregoing interest segment under seal pursuant to Plaintiffs' Administrative Motion to File Under Seal. (*See* ECF No. 98; *see also* Sur-Reply at 5 n. 13 (referring to interest segment).) Oracle does not oppose Plaintiffs' sealing motion.

- Alcohol segments targeting individuals of legal drinking age do not violate Oracle's privacy policy.

Once Plaintiffs choose to undertake meaningful discovery, that discovery will show that Plaintiffs' claims arising from the Discovery Material are simply wrong.

Third, Oracle rejects Plaintiffs' allegation that Oracle misrepresented its sale of these interest segments to the Court. (*Contra* Sur-Reply at 3.) As stated in its reply, "Oracle stands by its prior representation that it 'does not use any data it receives from customers to create sensitive interest segments.'" (Reply at 12 n.12 (quoting ECF No. 63 at 3).) The Discovery Material Plaintiffs now put before the Court in no way undermines that representation. Plaintiffs' claims to the contrary are entirely speculative and lack any factual basis.

III. CONCLUSION

For the foregoing reasons, Oracle respectfully asks the Court to decline Plaintiffs' invitation to consider their "new evidence" in resolving Oracle's motion to dismiss and to deny Plaintiffs' request for leave to amend to replead their ECPA claim as futile. *See Nunes*, 375 F.3d at 808.

Dated: March 18, 2024

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